No. 14909.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO,

Appellee.

APPELLANTS' OPENING BRIEF.

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Statement of the Pleadings and Facts Showing Jurisdiction.

There is no dispute about the jurisdiction of the District Court or of this court. This litigation arises out of an illness suffered by the libelant Vitco on board the vessel PIONEER while he was a fisherman on lays, the vessel being owned by appellants. The action in the District Court was by a libel *in personan.*

The admitted averments in the pleadings show that the causes of action set forth in the libel are within the admiralty and maritime jurisdiction of the District Court, pursuant to Article III, Section 2 of the United States Constitution and Title 28, United States Code, Section 1333. [T. R. pp. 6, 15.] The jurisdiction of this court to review the decree rests upon Title 28, United States Code, Section 1291, notice of appeal having been filed

within the time provided by Title 28, United States Code Section 2107.

In the libel Vitco brought action for: (a) $488.00 for medical service and care, (b) $5,552.00 for maintenance up to the date of filing the libel, April 5, 1954, (c) A full share of the catch of the PIONEER for the calendar year 1952. Appellants' answer denied liability to each of the above. Trial was had on February 23, 24 and 25, 1955. Appellants filed and served objections to the proposed Findings of Fact which objections were overruled without comment by the District Court. Thereafter, on May 21, 1955, the District Court issued its Findings of Fact and Conclusions of Law and on the same date issued its final decree in favor of the appellee for $135.00 for medical expenses, $5,834.00 for maintenance from January 29, 1952 to October 15, 1954, and $6,681.95, less appropriate withholding and social security tax deductions for Vitco's share of the catch, a total of $12,650.95 less said tax deductions, together with $141.65 costs.

Statement of the Case and Questions Involved.

The appellee Anthony Vitco, hereinafter referred to as Vitco, and the appellants Marion Joncich and Joseph C. Mardesich, hereinafter referred to as Joncich and Mardesich respectively, were all fishermen residing in the San Pedro area of Southern California.

Joncich, Mardesich and appellant Antonia Dogdanovich were the owners of the commercial fishing boat PIONEER of which Mardesich acted as master. On December 27, 1951 Vitco and Mardesich executed a contract (shipping articles) in writing [Resp. Ex. D] for a fishing voyage in Mexican waters. The voyage covered by the said contract began at San Pedro, California on December

27, 1951 and ended at the same port on February 25, 1952. [T. R. pp. 46, 226.]

While on said voyage, Vitco exhibited symptoms of an illness, left the vessel at Manzanillo, Mexico, on January 29, 1952 because of such illness, and was flown home at the owners' expense to San Pedro.

Vitco was examined by Dr. Murray Abowitz, on March 27, 1952, who diagnosed his condition being a coronary artery disease resulting from a myocardial infarction. Dr. Abowitz, on October 12, 1954, found that Vitco had reached a condition of maximum improvement in August, 1954. [T. R. p. 80.]

Vitco incurred an expense of $483.00 for medical service of which $348.00 was for doctors contacted on his own responsibility and $135.00 for a doctor to whom Vitco had been referred by the owners of the vessel.

At the time Vitco executed the shipping articles, he was a member of the fishermen's union, International Fishermen and Allied Workers of America, Local No. 33, which, at that time, had a valid and existing contract [Resp. Ex. B] with the owners of the PIONEER covering said vessel. [Supp. T. R. pp. 3 and 4.] Paragraph V of this union contract provided:

> "In event illness incapacitates any crew member from further work on board the vessel, he shall be entitled to receive his proportionate share of the earnings of the vessel to the date and hour said member leaves the boat. Upon regaining his health, he shall be reemployed on the boat. During illness, such member may be substituted for by another man. An ill member cannot demand his share while ashore. This paragraph does not pertain to a member injured on the boat."

This union contract also provided in a portion of paragraph XIV thereof as follows:

> "When crew members are hired, they are hired for the season and may be discharged only for good cause shown. For boats fishing tuna all-year-around, there shall be two tuna seasons within a year. One season commence on January 1st and end on the following June 30th, and the next tuna season shall commence on July 1st, and end on the following December 31st. When a boat arrives subsequent to the season termination date, the completion of the trip shall be deemed the end of the season."

The PIONEER, which was a tuna fishing boat, made as profit for each fishermen's net share the following sums for each of the trips pertinent to this case:

Trip ending February 25, 1952	Nil
Trip ending March 27, 1952	$1,161.13
Trip ending May 5, 1952	$1,150.09
Trip ending June 5, 1952	$1,501.52
Trip ending July 25, 1952	$1,401.17
Trip ending September 5, 1952	$1,156.63
Trip ending October 20, 1952	$311.41

[T. R. p. 226.]

The questions here involved:

1. Was Vitco entitled to maintenance for any period after August 31, 1954?

2. Was Vitco entitled to a share of the catches made by the PIONEER on voyages which began after February 25, 1952?

3. Was Vitco entitled to a share of the catches made by the PIONEER on voyages beginning after June 30, 1952?

Specification of Errors.

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Summary of Argument.

It is the appellants' contention that:

1. Vitco was not entitled to maintenance for any period after August 31, 1954, and that the trial court was in error in finding that he was entitled to such maintenance until October 15, 1954, for the reason that Vitco's condition became permanent and static in August, 1954.

2. Vitco was not entitled to any share of the fish catches of the PIONEER for the voyages which began after February 25, 1952, the date of termination of the voyage on which he became ill, for the reasons that:

a. His employment contract (the shipping articles) was for one fishing trip only, and,

b. The custom and practice was that a fisherman falling ill should receive only a share of the catch for the voyage on which he fell ill, and,

c. The union collective bargaining agreement [Resp. Ex. B] provided that a fisherman falling ill on board the vessel should be entitled to receive his share of the earnings only to the date and hour he left the vessel, and that he could not receive a share while ashore.

3. Or, in the alternative to 2 above, Vitco was not entitled to any share of the fish catches of the PIONEER for the voyages which began after June 30, 1952, for the reason that by the express terms of the said union agreement, the calendar fishing year was divided into two tuna "seasons," one beginning January 1st and ending June 30th, and the other beginning July 1st and ending December 31st; that said contract provided when crew members were hired, they were hired for the "season," which provision was followed by a description and definition of what "season" meant, that is, a six months period twice during the calendar year [Par. XIV of Resp. Ex. B]; and that the season for which Vitco was hired ended June 30, 1952.

ARGUMENT OF THE CASE.

Maintenance and Cure.

ASSIGNMENTS OF ERROR NUMBERS IV AND V.

IV.

"The District Court erred in finding that libelant was entitled to maintenance from January 29, 1952, until October 15, 1954, and that there was at the time of the making of the Findings of Fact and Conclusions of Law the sum of $5,834.00 due, owing and unpaid from respondents to libelant as and for maintenance."

V.

"The District Court erred in failing to find that libelant was entitled to maintenance, if any, from January 29, 1952, until August 1, 1954, and that there was due, owing and unpaid, if any, from respondents to libelant as and for maintenance, the sum of $5,484.00."

The sole reference in the testimony as to the date when Vitco's maximum cure had been attained was that of Dr. Murray Abowitz, as follows:

"Q. In your opinion does Mr. Vitco still suffer from a heart ailment? A. Yes, sir, he does.

Q. Is that a permanent condition? A. It is.

Q. Now, at what point, in your opinion, did he achieve the maximum improvement that you could give him, and did his condition become permanent or more or less static? A. I would estimate, roughly, that his condition stabilized and he achieved a maximum improvement in the late summer or early fall of 1954.

> Q. Is it possible, Doctor, to set a date when this sort of thing happens, or is that just not possible? A. It's very difficult. I would say approximately August of 1954." [T. R. pp. 79, 80.]

It is obvious that in October, 1954 Dr. Abowitz determined that Vitco's condition had become static in August, 1954.

It is not the date on which a doctor decides that at some prior time the patient reached the maximum cure, but the controlling factor, rather, is the date on which the seaman *in fact* reached the maximum cure.

In *Farrell v. United States,* 336 U. S. 511, at pages 518 and 519, the Supreme Court stated:

> "That the duty of the ship to maintain and care for the seaman after the end of the voyage only *until he was so far cured as possible,* seems to have been the doctrine of the American admiralty courts prior to the adoption of the Convention by Congress. . . . It has been rule of admiralty courts since the convention." (Emphasis added.)

The case at bar is not a case wherein the seaman was remaining away from work merely because he was under the care of a doctor. Vitco's condition was that of a heart ailment, permanent in condition [T. R. p. 79], and the trial court found that Vitco was totally disabled from January 29, 1952 to the time of the Findings of Fact. [T. R. p. 10.] There is no basis under the general maritime law for awarding a seaman maintenance for a period after which he, in fact, reached his maximum recovery,

under the *Farrell* case (*supra*) doctrine. It is conceivable, that if it were necessary for the seaman to forego employment for the purpose of waiting until the doctor could determine whether he had in fact reached the point of maximum cure, the court might feel that it would be unfair to the seaman to deprive him of work while he was waiting for such determination. However, this is not the present case, because the seaman was permanently disabled from work during all the period from January 29, 1952, up to the time of the trial. The only competent evidence on the determination of the date of the maximum recovery fixes it at some time in August, 1954, and, giving the appellee the benefit of every possible doubt as to the date, even though the burden of proof is his, he is not entitled to maintenance for any time after August 31, 1954.

To accept the fallacy of the libelant's contention that it is the date when the doctor makes his determination that at a previous time the maximum cure was reached, could result in clear absurdities. For example, if a permanently unfit-for-duty seaman were, five years after he reached his maximum cure, declared by a physician to have reached such cure five years previously, it is patent that a court would not award such seaman five years of maintenance when in fact his maximum cure had been reached five years before the determination.

Share of Catch; Libelant Not Entitled to Share of Catch for Any Voyage Beginning After February 25, 1952.

ASSIGNMENT OF ERROR NUMBERS VI, VII, VIII, X, XI, XII.

VI.

"The District Court erred in finding that libelant had been hired by respondents to serve aboard the said vessel during the full tuna season of the year 1952; the District Court further erred in finding that the libelant was entitled to a full share of the catch of said vessel during the full tuna season of the year 1952; and in finding that the amount due, owing and unpaid from respondents to libelant as and for his share of the tuna catch for the 1952 season of said vessel was $6,681.95, less taxes."

VII.

"The District Court erred in failing to find that libelant, pursuant to the provisions of Paragraph V of Exhibit 'D,' the collective bargaining agreement between libelant's Union and the respondents, the custom and practice involved, and the shipping articles in evidence, was entitled to no sum whatsoever as his share of the catch during the year 1952."

VIII.

"The District Court erred in failing to find, as an alternative to the error hereinabove next referred to, that the libelant was entitled only to a share of the catch for the first half of the year 1952 in an amount of $5,213.91, based on Paragraph XIV of said Exhibit 'D.'"

X.

"The District Court erred in finding that Paragraph V of the said collective bargaining agreement

is contrary to the established public policy of the maritime law to protect from impairment the seamans' historical right to maintenance and cure and to wages for the term of his employment."

XI.

"The District Court erred in failing to find that said Paragraph V of said collective bargaining agreement was at all pertinent times a valid subsisting and effective provision of said collective bargaining agreement and was binding on the libelant and the respondents."

XII.

"The District Court erred in concluding from the Findings of Fact that the libelant was entitled to judgment against respondents in the sum of $5,834.00 for maintenance, in concluding that libelant was entitled to judgment in the amount of $6,681.95, less taxes, for wages or share of the catch; and in concluding that libelant was entitled to judgment for his costs and disbursements therein." [T. R. pp. 19, 20, 21.]

It is agreed that a fisherman working on shares is a seaman and is, ordinarily, entitled to his share of the catch to the end of the voyage on which he was employed in the event that he becomes ill during such voyage and must leave the vessel.

The basic case with regard to wages to the end of the voyage, which in the case of fisherman is his share of the fish catch of that voyage, is in *The Osceola,* 189 U. S. 158 at page 175:

> "That the vessel and her owners are liable, in case a seaman falls sick . . . to his wages, at least so long as the voyage is continued."

Accordingly, to determine the length of time to which Vitco was entitled to receive share of catches of the PIONEER it is necessary to determine what the length of his employment was and whether it was for one voyage. This argument will deal with three points separately in this regard: the shipping articles, the custom and practice, and the collective bargaining agreement.

The Shipping Articles.

The shipping articles [Resp. Ex. D] constituted the contract of employment between the shipowner-captain and the seaman. (*The Seatrain New Orleans,* 127 F. 2d 878; *Aird v. Weyerhauser S.S. Co.,* 169 F. 2d 606.)

There is no question but that the libelant signed the shipping articles. [T. R. p. 231.] It is also true that fishermen on lays do not have to sign shipping articles before the Shipping Commissioner (Norris' Law of Seamen, Vol. 1, p. 104), and there appears to be no dispute as to the validity of the articles. These articles provide that the contract of employment shall be

> "from the Port of Los Angeles California to Mexican waters and such other ports and places in any part of the world as the Master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding 12 calendar months." [Resp. Ex. D, p. 1.]

These shipping articles provided for a voyage not to exceed twelve (12) months, which would terminate when the vessel came back to a final port of discharge in the United States. The exact point of whether a seaman could recover wages just to the end of the voyage or for the entire twelve (12) months period set out in the articles, was decided definitely in the case of *Farrell v. United*

States, 336 U. S. 511, at pages 520 and 521. There the Supreme Court said:

> "We think . . . that it obligated the petitioner only for the voyage on which the ship was engaged when he signed on and that, when it terminated at a port of discharge in the United States, *he could not have been required to reimbark for a second voyage. The twelve month period appears as a limitation upon the duration of the voyage and not as a* stated period of employment." (Emphasis added.)

In order to determine what the "final port of discharge in the United States" was in the case at bar, the following definitions appear to be pertinent:

The port of discharge is the port at which the vessel is completely relieved of cargo and becomes ready for another venture. (*The Larimer,* 174 Fed. 429.) A final port of discharge is the last port of delivery where cargo is discharged or where some other act is done which has the effect of terminating the voyage. (*Schermacher v. Yates,* 57 Fed. 668; *United States v. Barker,* Fed. Case No. 14516; Norris, Law of Seamen, Vol. 1, pp. 135 and 136.)

At the end of each voyage, when a fishing vessel returns to San Pedro, the fish is unloaded and the various shares are paid to the fishermen before going out again on another trip. [T. R. pp. 258 and 259.]

Without question, there was a final port of discharge on February 25, 1952 [T. R. p. 226] when the voyage on which Vitco fell ill terminated, and under the contract of employment the employment itself had terminated thereby, and Vitco was not entitled to share in any catch of a voyage which began thereafter.

Custom and Practice.

In addition to the shipping articles, it was the custom and practice that a fisherman who became ill on a voyage and was unable to continue the voyage was paid only for that particular voyage. In this regard the appellant Mardesich gave the following testimony which was not contradicted:

> "Q. I see. Now, is there a custom and practice as to the payment of share of catches to fishermen who became ill on a voyage and are unable to continue the voyage?
>
> * * * * * * * *
>
> The Witness: Yes, sir.
>
> The Court: How long has that been the custom?
>
> The Witness: As far as I can remember. It's always been a custom if a man became ill on a certain voyage he received his share for that voyage." [T. R. pp. 257, 258.]
>
> * * * * * * * *
>
> "Q. Mr. Mardesich, now on this business of a custom to pay a man who becomes ill on a boat only for that particular voyage, how did you obtain your knowledge of that custom? What I mean is—well, let me make it a little more specific.
>
> Did you just learn that from the way the boats you were on operated, or did you learn that from conversation around or from some contracts? How did you learn that? A. I learned that from experience of my own and other boats." [T. R. p. 259.]

It appears that the language of this Honorable Court in the case of *Medina v. Erickson,* 1955 A. M. C. 2211,

decided in October, 1955, is particularly appropriate to the facts of the case at bar:

> "Because the articles did not with particularity state the duration of the intended voyage, and in the light of the prevailing custom to sign on for a voyage rather than for a fixed period, we hold that the twelve-month period is a limitation upon the duration of the voyage and not a stated period of employment . . . Erickson's employment having ended when the ALPHECCA completed the first voyage, the trial court erred in awarding . . . a sum equal to the chief engineer's share of the catch for the second and third trips of fishing vessel."

Therefore, it is respectfully submitted that in view of the shipping articles and the custom and practice involved, the lower court herein should not have awarded Vitco the share of the catch of any voyage after that which ended on February 25, 1952.

Collective Bargaining Agreement.

In addition to the shipping articles and custom and practice the provisions of the collective bargaining agreement [Resp. Ex. B, par. V] restrict Vitco to a share of the catch of only the voyage on which he fell ill. It was stipulated at the trial [Supp. T. R. pp. 3 and 4] that Respondents' Exhibit B, the contract between the International Fishermen and Allied Workers of America, Local No. 33, and the owners of the PIONEER, was in effect at all pertinent times, covering the vessel PIONEER, and that Vitco was a member of said union at all pertinent times. Paragraph V thereof reads as follows:

> "In event illness incapacitates any crew member from further work on board the vessel, he shall be

entitled to receive his proportionate share of the earnings of the vessel to the date and hour said member leaves the boat. Upon regaining his health, he shall be reemployed on the boat. During illness, such member may be substituted for by another man. An ill member cannot demand his share while ashore. This paragraph does not pertain to a member injured on the boat." [Resp. Ex. B.]

The trial court held that said paragraph V of said collective bargaining agreement was contrary to the established public policy of the Maritime Law. [T. R. p. 11.]

Before discussing public policy as applicable to this agreement, it might be well to ascertain from said agreement what the respective parties obtained as consideration therefrom. The union was recognized therein as the exclusive bargaining representative of all the employees covered by the agreement. [Par. I of Resp. Ex. B.] The members of the union, through their exclusive bargaining representative, received the following benefits from said contract:

1. The crew members of a fishing vessel could not be made to work more than six (6) days in preparing the vessel. [Par. III of said Ex. B.]

2. In the event that a crew member did not appear to help put away the gear and boat at the close of the season and was fined therefor, the fine-money, if no one took his place, was divided among the crew. [Par. IIIb of said Ex. B.]

3. The crew members had the right to limit the number in the crew and thus increase their shares, a right which ordinarily rests with the master of a vessel, that

is, the right to add more men to his crew. [Par. XIII of said Ex. B.]

4. When a crew member was hired, he was hired for the full six months season and could be discharged only for good cause shown. [Par. XIV of said Ex. B.]

5. When a member of the union was absent from his work because of union business, he would have his share continued while so absent. [Par. XVI of said Ex. B.]

6. When the fish was unloaded, the crew members would receive the assistance of six additional men to unload the tuna. [Par. XXIII of said Ex. B.]

7. The employer agreed therein to transfer disability insurance covering the crew members from the state plan to a plan administered by the union. [Par. XXIV of said Ex. B.]

There is, therefore, sufficient consideration for the execution of the contract herein involved, the basic law being, as here on each side, that there is sufficient consideration for a promise if the promisee foregoes some advantage or benefit or parts with a right. (*Louisville and N. R. Company v. Mottley,* 217 U. S. 467.) Obviously, in exchange for the restrictions contained in paragraph V of the agreement, the members of the union, said union being their exclusive bargaining representative, received a number of advantages and, without doubt, there was sufficient consideration on both sides to support this agreement.

This being so, the only attack made on the provisions of said paragraph V, is that of it being void as against public policy.

Just what is "public policy"? The Supreme Court of the United States in the case of *Steele v. Drummond*, 275 U. S. 199, stated as follows:

> "The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition . . ."

The act of a court in setting aside an agreement always conflicts with our ancient freedom to contract. In order for a court to be warranted in taking such action there must be present some danger or detriment to the public or some illegality of purpose. Detriment to the public interest, the basis of the doctrine of "public policy," will not be presumed where nothing sinister or improper is done or contemplated. (*Valdes v. Larrinaga,* 233 U. S. 705.) In this *Valdes* case, at page 709 thereof, Justice Holmes stated:

> "We discover nothing in the language . . . that necessarily imports or even persuasively suggests, any improper intent or dangerous tendency."

There must be some overwhelming public interest that will give a basis for the violation by a Court of the constitutional right of contract.

On this point the United States Supreme Court in *Steele v. Drummond,* 275 U. S. 199, stated:

> "It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. *And it is a matter of great public concern that freedom of contract be not lightly interfered with.*" (Emphasis added.)

It is strongly submitted that a court should not, except in the most extreme cases, interfere with freedom of contract so as to relieve one party of an obligation which he has entered into fairly and honestly. This principle is set out, as a warning, by the Supreme Court in the case of *Twin City Pipe Line Company v. Harding Glass Company,* 283 U. S. 353 at page 356:

> "The principle that contracts in contravention of public policy are not enforceable . . . *should be applied with caution* . . ." (Emphasis added.)

This case strongly upholds the principle that persons shall have the utmost liberty of contracting and their agreements, voluntary and fairly made, shall be held valid and enforced in the courts.

A very important quality of the doctrine of "public policy" is peculiarly applicable to seamen and their conditions. This quality of "public policy" is that it may change from generation to generation as changing political, economic and sociological changes are effected in our country. This inherent quality in the doctrine of "public policy" is set forth clearly by the United States Supreme Court in the case of *Patton v. United States,* 281 U. S. 276 at page 306, wherein the court states:

> "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, *should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed condition, be the public policy of another.*" (Emphasis added.)

It is to be noted that in the case at bar there is no constitutional or statutory basis for the trial court's holding that said paragraph is void as against public policy.

A seaman, today, represented as he is by his union, is as well equipped, safeguarded, and assured of the protection of his rights as any other person in the United States.

To illustrate the difference between the economic and social condition of the seamen of several generations ago and the seamen of today, so as to determine whether the so-called public policy in existence at that time, if any, should be applied to litigation today, it might be well to review the description of the sailor of 1823 as given in the classic opinion of Justice Story in *Harden v. Gordon*, Fed. Case 6047, and compare it with that of today:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. In many voyages, particularly those to the West Indies, the whole wages are often insufficient to meet the expenses occasioned by the perilous diseases of those insalubrious climates."

In order for this Honorable Court to determine what "public policy" is as applied to the case at bar, it is suggested that this Honorable Court may take judicial notice of these facts: that today the American sailor has the best of food and living quarters, he works a 40-hour week with increased pay rates for any overtime he may voluntarily work; he is entitled to free medical care and cure at the United States Public Health Service; his wages cannot be attached or assigned; the unlicensed sailor earns from $550.00 to $900.00 per month, considerably more than the average worker and more than many professions, such as that of teacher; in addition, he has a position, as far as personal injury litigation is concerned, far superior to any other type of employee, that is, if he be injured on his vessel, he not only may recover what in effect is a type of workmen's compensation consisting of maintenance until he is cured or has reached maximum benefits plus the free medical facilities of the United States Public Health Service, but may, of course, pursue his personal injury action against his employer, not merely on the grounds of negligence, but for a species of liability without fault, unseaworthiness. In this regard, this Honorable Court may well take notice of the fact that the maritime unions have consistently opposed the extension of any type of workmen's compensation legislation to seamen for the obvious reasons that sailors now have in substance workmen's compensation benefits together with the right to sue their employers.

Ordinarily, these facts would not be pertinent in the type of action at bar, but where it is a question of public policy they are relevant in order for this Honorable Court to evaluate, in terms of public interest, the true status of the modern-day American sailor, so as to determine if

he may bargain collectively with his employer without doing violence to the public interest of legality and good morals. Too, since the law is a living thing and recognizes changes as they occur, the status of the maritime unions of today should be noted to add light on the question of whether public interest is offended by such collective bargaining, there not being any such unions in existence at the time of Justice Story's opinion above cited.

Accordingly, it is respectfully submitted that this Honorable Court should take further judicial notice of the fact that today the maritime unions are among the most powerful in the United States, fully capable of protecting themselves and their members in any type of economic struggle with the shipowners or anyone else. They have the power, if they so desire, to stop all shipping on any of the coasts of the United States. These facts are, today, self-evident. Thus, it does not appear well founded in logic or in fact to hold, particularly in view of the cautionary language of the United States Supreme Court as hereinabove cited, that Vitco, a seaman, acting through and being represented by his union, may not contract with regard to exchanging one type of benefit, that of wages to the end of his employment, for other advantages accruing to him as have been hereinbefore set out. This would appear particularly so where the advantage he is giving up is not some advantage based on humanity and welfare, such as would be maintenance and cure, but is simply his wages to end of the voyage. It is to be noted that under the contract in question in the case at bar, there is no giving up of his right to maintenance and cure. This contract was a purely mercenary contract on both sides motivated by the desire on the part of the

union members and the shipowners each to secure their best financial bargain. They reached an agreement whereby each party gave up some advantages and under the decisions of the United States Supreme Court above cited it is submitted that the decision of the trial court to declare the said paragraph V void as against public policy clearly ignores the actual conditions which exist in this decade of the twentieth century, and that such decision cannot be upheld on reason, right, law or equity, and clearly, without sufficient basis, interferes with the freedom of contract.

Share of Catch; Libelant Not Entitled to Share of Catch for Any Voyage Beginning After June 30, 1952.

ASSIGNMENT OF ERRORS NUMBERS VI, VIII, XII.

VI.

"The District Court erred in finding that libelant had been hired by respondents to serve aboard the said vessel during the full tuna season of the year 1952; the District Court further erred in finding that the libelant was entitled to a full share of the catch of said vessel during the full tuna season of the year 1952; and in finding that the amount due, owing and unpaid from respondents to libelant as and for his share of the tuna catch for the 1952 season of said vessel was $6,681.95, less taxes."

VIII.

"The District Court erred in failing to find, as an alternative to the error hereinabove next referred to, that the libelant was entitled only to a share of the catch for the first half of the year 1952 in an amount of $5,213.91, based on Paragraph XIV of said Exhibit 'D.'"

XII.

"The District Court erred in concluding from the Findings of Fact that the libelant was entitled to judgment against respondents in the sum of $5,834.00 for maintenance; in concluding that libelant was entitled to judgment in the amount of $6,681.95, less taxes, for wages or share of the catch; and in concluding that libelant was entitled to judgment for his costs and disbursements therein."

Paragraph XIV of the collective bargaining agreement [Resp. Ex. B] provides as follows:

"When crew members are hired, they are hired for the season and may be discharged only for good cause shown.

"For boats fishing tuna all-year-around, there shall be two tuna seasons within a year. One season shall commence on January 1st and end on the following June 30th, and the next season shall commence on July 1st, and end on the following December 31st. When a boat arrives subsequent to the season termination date, the completion of the trip shall be deemed the end of the season . . ."

It is of great importance that this provision in the collective bargaining agreement does *not* prohibit or in any way hamper a seaman from obtaining his wages (share of catch) to the end of the voyage or until the end of his term of employment. This paragraph XIV does, however, set forth distinctly what the term of the employment shall be. This is a very important distinction between paragraph V (of the collective bargaining agreement) and paragraph XIV, the former providing that the fisherman shall receive his share of the catch only to the time he leaves the vessel, while the latter, as stated

above, sets out how long the period of employment shall be.

It is to be noted that the trial court did not declare said paragraph XIV void as against public policy, the only reference to the collective bargaining agreement to be found in the findings of fact sets out that the collective bargaining agreement was in full force and effect at the time that the contract of employment was entered into between the libelant and the respondents, that the union represented the fishermen including the libelant, and that *paragraph V* thereof is contrary to public policy. [Finding of Fact No. 10, T. R. pp. 10 and 11.]

There is nothing ambiguous or uncertain about the wording of said paragraph XIV which, in its essence, merely repeats the maritime law that when crew members are hired they are hired for the season and then defines, by dates, the two seasons in each calendar year. The first season ran from January 1st through June 30th and the second season began on July 1st and ended on December 31st. The said paragraph XIV also provides that when a vessel returns home after the end of the calendar season, that said season shall be extended to the completion of the said trip. The total value of a share of each of the five (5) trips made by the PIONEER from the time Vitco began the voyage on which he fell ill to the end of the first season (including the last trip which ended July 25, 1952, but which began prior to June 30, 1952, and thus is included in the first season of the calendar year 1952) is $5,213.91. [T. R. p. 226.] However, the trial court awarded Vitco a share of the catch of the trips ending September 5, 1952 and October 20, 1952, both of which began after June 30th of 1952, in a total additional amount of $1,468.04. [T. R. p. 226.]

The only evidence concerning Vitco's averment that he was hired for one year, is the testimony of Vitco as follows:

> "Q. You had worked with Mr. Joncich on the Pioneer before? A. About two years before, yes, sir. He asked me if I would want to go fishing tuna this year with him. I told him no, I didn't want to go.
>
> Well, he says, 'Where you going?'
>
> I told him, 'I might go to San Diego, fish on Normandy.' Because I did fish on Normandy one trip before.
>
> He says, 'Why you want to go to San Diego? You know you can make $10,000 with me this year. I'm going with you guys, too.' And talk and talk and talk, and finally I say yes and I accepted." [T. R. pp. 44 and 45.]

There does not appear in said evidence any contract of employment, particularly with regard to the length thereof. The only mention of time at all is that Joncich is alleged to have said "you know you can make $10,000 with me this year." This statement means no more than that Vitco, if he remained on the vessel during the calendar year 1952, could make $10,000.00. To read into this testimony a contract of employment for one year, particularly in view of the libelant's burden of proof and the collective bargaining agreement, seems unreasonable, unsound and not supported by the evidence.

There is a further fatal defect in the alleged oral contract of hire, and that is that it is obvious that since the trial court found that the collective bargaining agreement was in existence at the time that Vitco and Joncich entered into the so-called contract of employment [Find-

ing of Fact No. 10, T. R. pp. 10 and 11], there was no consideration passing from Vitco to Joncich in exchange for Joncich allegedly agreeing to hire Vitco for an entire year, Vitco and Joncich already being bound by the collective bargaining agreement as to the times and durations of employment as set out in paragraph XIV thereof. In this regard, it might be pertinent to quote from the opinion of Judge A. N. Hand in the case of *Foreman v. Benas and Company,* 247 Fed. 133, a case in which the contract of employment was the shipping articles, as distinct from union bargaining agreements, but the principle thereof being the same, when speaking of certain representations made by the owners to the seamen:

> "If the representations were made before the articles were signed, they are merged in the articles; and *if made later they were of no effect because without consideration.*"

Therefore, it is respectfully urged that not only was there no evidence adduced at the trial by which Vitco could sustain his burden of proof that there was an oral contract for a hiring period of one year, but assuming, *arguendo,* that such did exist, it was inferior to the collective bargaining agreement, could not be considered to explain any ambiguity in the collective bargaining agreement, for such ambiguity did not exist, and furthermore was entirely without consideration.

Even in the event that the trial court was justified in awarding Vitco a share of any of the voyages after that ending February 25, 1952, which appellants strongly deny, it seems patent that under no theory whatsoever could the trial court award Vitco any amount for the share of catches in excess of $5,213.91, said sum being the total

amount of a share for the voyages including the one ending July 25, 1952, *i.e.,* for the first six-months season as set out in the collective bargaining agreement.

Conclusion.

It is respectfully urged by appellants as follows:

1. That appellee is not entitled to any maintenance for any period after August 31, 1954, and that the judgment in the amount of $5,834.00 for maintenance should be decreased by forty-five (45) days or $270.00.

2. That on each of the following three bases separately, and all three, jointly, the appellee should be limited to his share of the catch of the first voyage which ended February 25, 1952, and on which he fell ill, said voyage having resulted in a net loss, and is entitled to nothing insofar as his share of the catch for the balance of 1952 is concerned:

   a. The shipping articles,
   b. The custom and practice,
   c. Paragraph V of the collective bargaining agreement.

3. That, in any event, appellee is not entitled to any share of the catch in excess of $5,213.91 under the terms and provisions of paragraph XIV of the collective bargaining agreement, neither said paragraph nor said agreement having been attacked or voided in any way by the appellee or by the trial court, and that the judgment for said shares in the amount of $6,681.95 should be reduced to said $5,213.91.

Respectfully submitted,

Robert Sikes,

Proctor for Appellants.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

No. 14909

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO,

Appellee.

APPELLEE'S BRIEF.

Statement Re Jurisdiction.

The proceedings herein are founded upon a seaman's libel *in personam* for maintenance, cure and share of the catch filed on the Admiralty side of the Court in the United States District Court for the Southern District of California, Central Division. The issues tried were formulated by the Second Amended Libel [Tr. 3-7] and the Answer thereto [Tr. 12-16]. Said action for maintenance, cure and share of the catch is within the Admiralty and Maritime jurisdiction of the District Court pursuant to Article III, section 2, of the United States Constitution and 28 U. S. C., section 1333 [Tr. 6, 15].

This Court has jurisdiction to hear this appeal under 28 U. S. C., section 1291.

Statement of the Case.

The allegations in the Second Amended Libel and the Answer thereto material to this appeal are as follows:

Respondents are and were the owners and operators of the fishing vessel PIONEER. Libelant was a fisherman who was employed by the respondent as a member of the crew of said vessel at wages in the form of a share of the proceeds of the catch thereof, "pursuant to an oral agreement of hiring for the period of the tuna fishing season of the year 1952" [Par. III, Second Amended Libel, Tr. 4]. While so employed libelant fell ill of a heart condition and was forced to leave the vessel on this account. He was thereafter continuously disabled and in need of and obtaining medical care and cure up to the time of the filing of the libel. At the time of the filing of the libel on April 5, 1954, there was due and unpaid to libelant from respondents the sum of $5,552.00 for maintenance. In addition, it was alleged that libelant was entitled to a full share of the catch of said vessel PIONEER for the 1952 tuna fishing season and an accounting with respect thereto was requested. Respondents' answer admitted ownership of the PIONEER and admitted *that respondent had hired libelant for the tuna fishing season of the year 1952* [Par. II of Answer, Tr. 12]. It was admitted that libelant left the vessel on January 29, 1952. On lack of information and belief libelant's illness and the nature thereof and the allegations concerning the amount of maintenance due and the right to receive a share of the catch were denied. It was affirmatively alleged that the oral contract of employment provided that libelant would not be entitled to a share of the catch if he fell ill and that under such circumstances he would not be entitled to such share under the prevailing custom [Tr. 12-15].

On all of the matters referred to above the court found that libelant's allegations were true and that respondents' denial and affirmative allegations were untrue. It was found that libelant was entitled to maintenance at the "agreed rate of $6.00 per day from the time the illness impelled him to leave the vessel on January 29, 1952 until October 15, 1954 when libelant's physician reasonably and in good faith determined for the first time that libelant had reached the state of maximum possible recovery in August 1954" [Tr. 11].

The court found that libelant was entitled to $5,834.00 in maintenance and $6,681.95 as his share of the catch minus the deductions required by law from the latter. The court also found that it was true that at the time in question here there was a collective bargaining agreement in effect covering the PIONEER which contained a clause providing that a fisherman who fell ill in the service of the vessel should receive compensation only up until the time that he left the vessel and that this clause is "contrary to the established public policy of the maritime law to protect from impairment the seaman's historical right to maintenance and cure and to wages for the term of his employment" [Tr. 7-12].

Evidence to the following effect was introduced. Fishermen, like the libelant here, are employed upon the basis of a share of the catch. The food consumed by the crew is paid for by them out of their earnings [Tr. 44]. It is the custom for fishermen to prepare the boats and the nets for fishing before the beginning of each season. On all year round tuna boats such as the PIONEER this was done once a year, generally before Christmas. The time consumed in the preparation of the boat for fishing

is from one to two months depending on what work is required. The fishermen receive no compensation for this work and even have to pay for the food consumed aboard the vessel while this work is being performed. On the all year round tuna boats like the PIONEER, except when the boat is laid up once a year for general maintenance work by the crew as described above, the boat fishes all year round absent engine trouble or something of that kind which prevents fishing [Tr. 39-42, 272-3]. One of the respondents, the master of the PIONEER, conceded that on all year round tuna boats the season is considered as the entire fishing year which starts in December or January and ends in September, October or November [Tr. 273]. The evidence is uncontroverted that it is the custom on all year round tuna boats to hire fishermen for a season constituting a full year of fishing [Tr. 43]; that on the first trip of the year either in December or January the crew members sign Shipping Articles; and that they sign no other articles that year no matter how many trips are made. On the following year on the first trip new articles are signed which continue in effect for the entire year [Tr. 46-8, 254-5].

Late in 1951 libelant was approached by one of the respondents and asked to go tuna fishing "this year" with respondents on the PIONEER. Libelant indicated that he was considering employment on some other boat and the respondents then urged him to come on the PIONEER saying, "You can make $10,000 this year" [Tr. 45]. Libelant accepted the employment and started work in early November on the PIONEER getting the boat ready for fishing. He worked more than one month in this preparatory operation working seven days a week [Tr. 45-6]. Libelant's heart attack occurred during the first

trip of the vessel on which the boat made no earnings at all. As a matter of fact, the members of the crew were in debt for the cost of the food [Tr. 226-7].

After the work on preparing the vessel for fishing had been completed and when the vessel was about to depart on its first trip, libelant and other members of the crew signed Shipping Articles on December 27, 1951 [Ex. D, 231-2]. These articles were prepared by the broker who was hired by the captain of the vessel [Tr. 257, 268-9]. Libelant never read the articles nor was he ever informed of what they contained [Tr. 252]. The respondent, who was Master of the vessel, also signed the articles without reading them and didn't recall any member of the crew reading the articles [Tr. 269]. The Shipping Articles referred to employment of the fishermen on the PIONEER "now bound from the Port[1] of Los Angeles, California, to Mexican waters *and such other ports and places in any part of the world as the master may direct,* and back to a final port of discharge in the United States *for a term not exceeding twelve calendar months.*[2]" (Emphasis added.) Boats like the PIONEER averaged approximately thirty days on trips to Mexico. A trip which lasts seventy days is extraordinarily long and trips never last a year [Tr. 267-8].

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[1]"Here the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and *probable length of the voyage is to be stated,* and the port or country at which the voyage is to terminate." (Emphasis added.)

[2]"If these words are not necessary, they must be stricken out."

The collective bargaining agreement in effect at the time covering the vessel and its crew contained a paragraph reading as follows:

> "In the event illness incapacitates any crew member from further work aboard the vessel, he shall be entitled to receive his proportionate share of the earnings of the vessel to the date and hour said member leaves the boat. Upon regaining his health he shall be reemployed on the boat. During illness, such member may be substituted for by another man. A new member cannot demand his share while ashore. This paragraph does not pertain to a member injured on the boat." [Ex. B, Supp. Tr. 3 and 4.]

However, respondents' testimony was to the effect that this paragraph of the agreement was not followed but that the custom was that when men fell sick on a voyage that they receive their share for the entire voyage, not just up to the time that they ceased working [Tr. 257-8]. Also the same custom applies to men injured aboard a vessel [Tr. 260-1].

Paragraph XIV of the aforesaid collective bargaining agreement provides that crew members are hired for the season, during which they may not be discharged without good cause, and that all year round tuna boats shall have two seasons, the first of which ends on June 30 [Ex. B, Supp. Tr. 3-4].

As a result of his heart attack libelant required medical care and rest and was unable to work but his condition continued to improve until it became stabilized about August, 1954. The fact that the condition became stabilized at that time could not be determined in August but had to await a subsequent examination which revealed that libelant's condition remained substantially unchanged for

some time. The fact that the condition had become stabilized in August, 1954, was first determined by the doctor on October 12, 1954 [Tr. 79-80].

Except for ordinary layovers for a few days between trips and one longer layover because of mechanical trouble, the PIONEER fished continuously from December, 1951 (when it left on its first trip for the 1952 season) until September of 1952 (up until which time the trial court allowed libelant to recover for a share of the catch) when the boat ceased fishing for the season. Paragraph III(b) of the collective bargaining agreement referred to above [Resp. Ex. B, Supp. Tr. 3 and 4] reads as follows:

> "At the close of the fishing season the crew shall wash the boats, strip the nets, and put away the gear within three days after the fishing season is over or when the boat arrives in port, weather permitting."

The work described in this paragraph was done at the end of the season in September of 1952 but was not done at any time between the first trip, beginning in December 1951, and the last trip ending in September, 1952 [Tr. 261-5]. In this respect the respondents followed the usual practice prevailing on all year round tuna boats to have only one season a year and to lay up the boats only at the end of the season, at which time the aforesaid work described in paragraph III(b) of the collective bargaining agreement was done [Tr. 271-2].

On the basis of these facts the appellants contend that appellee was not entitled to a share of the catch resulting from any trip after the one on which he fell ill because his admiralty right thereto had been bargained away by the union under its collective bargaining agreement; that in any event appellee was not entitled to a share of the

catch on voyages beginning after June 30, 1952, because of the collective bargaining agreement provision dividing the year for all around tuna boats into two seasons; and that appellee was not entitled to maintenance for any period after August 30, 1954, because his condition became stationary at that time and it is immaterial that this fact could not have been determined until September 12 of the same year. The trial court's rulings to the contrary and appellee's contention that the trial court was correct pose the issues to be determined on his appeal.

Summary of Argument.

1. Wages to the end of the period of the seaman's employment, together with maintenance and cure, when a seaman is forced to leave his employment by reason of either illness or injury is a right created by Admiralty Law. Wages, maintenance and cure are all separate elements of a single right designed to afford a measure of security to seamen who are injured or fall ill while in the service of their ship. The rights and obligations with respect to wages, maintenance and cure become part of every maritime agreement of hire not by reason of the meeting of the minds of the parties with respect thereto, but solely by operation of law. These rights are not created by contract and they cannot be negated by contract whether it be the individual contract of the seaman or that of his collective bargaining agent or the creation of a custom claimed to be part of either contract. These admiralty rights flow from the Constitution's adoption of the principles of Admiralty Law, which can be modified by the action of no individual, group of individuals or custom. Accordingly the provision of the collective bargaining agreement purporting to deprive fisher-

men of their right to wages to the end of the period of employment when they fall ill in the service of the ship is void and cannot be enforced.

2. Regardless of how the collective bargaining agreement is construed, it does not prohibit and is not inconsistent with a boatowner's agreement to employ a fisherman for an entire year, regardless of whether that year be deemed two seasons under the contract. It is admitted by the pleadings and the undenied evidence is that libelant was hired for the entire year of 1952. So, too, the uncontradicted evidence is that the custom on all year round tuna boats is to employ fishermen for the entire fishing year. This custom violates neither any provisions of law nor of the collective bargaining agreement. The Shipping Articles signed by libelant are not inconsistent with the oral contract and custom described above and in fact, reasonably construed under all of the circumstances of this case, including, particularly, the fact that only one set of shipping articles are signed each year, supports the finding that the hiring was for the 1952 year of fishing. Finally, the collective bargaining agreement itself is ambiguous with respect to the question of seasons for all year round tuna boats as we shall show in the argument and does not support appellants' assertion that the fishing season necessarily ended on June 30, 1952. Even if it did, however, the agreement to employ for the entire year is perfectly valid and is controlling here.

3. Under established authority maintenance may be allowed until the maximum cure is obtained and for a reasonable time thereafter. In addition, cure is not maximum until that fact is ascertained by the treating doctor. Under either of the foregoing propositions the trial court properly allowed maintenance until September 15, 1954.

ARGUMENT.

I.

The Trial Court Correctly Ruled That the Collective Bargaining Agreement, Insofar as It Purported to Deprive Appellee of His Admiralty Right to Wages to the End of His Period of Employment, Is Contrary to the Admiralty Law and Is Void.

A seaman's right to maintenance and cure and wages to the end of the voyage or period of employment arise out of admiralty and maritime law. Such wages are a part of and are not separable from maintenance and cure. *The Hawaiian,* 33 Fed. Supp. 985 (D. C., D. Md., 1940); *Warren v. United States,* 75 Fed. Supp. 836 (D. C., D. Mass., 1948); *Pacific Steamship Co. v. Peterson,* 278 U. S. 130; *Enochasson v. Freeport Sulphur Co.,* 7 F. 2d 674, 675 (D. C., S. D., 1925); *Pacific Mail S.S. Co. v. Lucas,* 264 Fed. 938 (C. A. 9, 1920); *Great Lakes S.S. Co. v. Geiger,* 261 Fed. 275 (C. A. 6, 1919). It has been held in this circuit that the same rules of law apply to eligibility for wages to the end of the period of employment as are applicable to maintenance and cure. *Pacific Mail S.S. Co. v. Lucas,* 264 Fed. 938, 941 (C. A. 9); see also, *Ward v. American President Lines,* 95 Fed. Supp. 609, 677 (D. C., N. D. Cal., 1951). "The expenses of maintenance and cure would be regarded as a mere incident to the wages for which there is undoubtedly a privilege." *The Osceola,* 189 U. S. 158, 170. The seaman's right to maintenance, cure and wages are "grounded solely upon the benefit which the ship derives from his service." The court goes on to say that this right is one "implied in law as a contractual obligation arising out of the nature of the employment. *Pacific S.S. Co. v. Peterson, supra,* 278 U. S. 130, 137-8. The fact

that the right to maintenance, cure and wages does not depend upon the agreement or intent of the parties is further manifested by the fact that the ship is liable therefor even though it is not a party to the contract of employment. *The Edward Pierce,* 28 Fed. Supp. 637; *The Montezuma,* 19 F. 2d 355, 356 (C. A. 2).

It is a general principle of admiralty and maritime law that agreements which tend to deprive a seaman of his rights under that law will be declared void. Thus in *The Cypress,* 6 Fed. Cases 1104, No. 3530, a provision in the articles that the seamen would not sue for their wages for three months after the voyage ended was held void under general principles of admiralty law. It has also been held that a seaman cannot by the form of the charter be deprived of his admiralty lien on the vessel for wages. *The General J. A. Dumont,* 158 Fed. 312 (D. C., E. D. Va., 1907). Similarly, a seaman's right to participate in salvage proceeds in exchange for an extra month's wages has been held invalid. *Conekin v. Lockwood,* 231 Fed. 541 (D. C., E. D. S. C., 1916). The District Court for the Northern District of California (Judge Goodman) has held that where an admiralty contract provides for dismissal pay the maritime lien for those dismissal wages cannot be waived by agreement. The right to the lien is not created by voluntary agreement by the owner and the seaman and therefore "it cannot be contractually waived." "In maritime law a contract may fix the term of service, the nature of the service, and the amount of compensation. The amount earned for services rendered pursuant thereto, by law, automatically becomes a lien . . ." *Gaynor v. The New Orleans,* 54 Fed. Supp. 25. So too the right to wages to the end of the period of employment is not created by the agree-

ment of the parties but automatically comes into effect after the parties have contracted with respect to the term of the service and the amount of compensation.

In the case of *Cortes v. Baltimore Insular Line,* 287 U. S. 367, 371, the court, speaking of maintenance and cure of which wages to the end of employment is an inseparable part, said: "Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident. . . . We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." It is this inseparable incident attached to the agreement of hire without heed to any expression of the will of the contracting parties that the appellants' claim has been contracted away by the collective bargaining agent of appellee. See also *Harden v. Gordon,* Fed. Case 6047; *DeZon v. American President Lines,* 318 U. S. 660, 667; *Freeman v. Baker,* Fed. Case 5084; *Venides v. United Greek Shipowners Corp.,* 168 F. 2d 681 (C. A. 2, 1948); *Glandzis v. Callinicos,* 140 F. 2d 111 (C. A. 2, 1944); *Lakos v. Saliaris,* 116 F. 2d 440, 444 (C. A. 4, 1940).

This right which appellants contend can be waived by the contract of a collective bargaining representative flows from the Constitution of the United States. Article III, Section 2, of that Constitution adopts as the law of the land the principles of admiralty and maritime law and requires that those principles be enforced by the courts

of the United States. *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U. S. 36, 40 *et seq.* In the commentary on maritime workers appearing in Title 46 of United States Code Annotated and beginning at page 211 thereon, it is stated specifically with respect to the right to maintenance, cure and wages at page 214: "These rights and the enforcement of them in admiralty were preserved to the seamen by the Constitution. His remedy was enlarged by the 'saving to suitors' clause of the Judicial Code (Pars. 24, 256. 28 U. S. C. A., Pars. 41(3), 371), to give him at his election the right to sue the owner of the vessel in a common law with the right of trial by jury." Rights of seamen, whether created by admiralty and maritime law or by statute, cannot be cancelled out by private agreement. *McCarthy v. Steam-Propeller City of New Bedford,* 4 Fed. 818; *Lakos v. Saliaris, supra,* 116 F. 2d 440, 443; *The San Marcos,* 27 Fed. 567 (D. C., S. D., N. Y., 1886).

A collective bargaining agent has no greater power in this regard than the seaman himself. As Judge Mathes stated in his opinion below:

> "If then the seaman himself is powerless, for reasons of public policy, to part with his right to wages, the union as collective bargaining agent *a fortiori* is powerless so to do (see *Brotherhood of Railroad Trainmen v. Howard,* 343 U. S. 768, 773-774 (1952); *Wallace Corp. v. Labor Board,* 323 U. S. 248 (1944); *Ahlquist v. Alaska-Portland Packers' Association,* 39 F. 2d 348 (C. A. 9, 1930))."

If appellants' argument were correct that a collective bargaining agent could bargain away admiralty or statutory rights for consideration then all right to maintenance and cure could be bargained away as well as the right

for wages to the end of the period of employment. So could the right to Workmen's Compensation, the right to recover under the Jones' Act, the right to the payment of minimum wages provided by law, etc. Thus the purpose of the law to establish uniform safeguards for all in a particular classification—not safeguards which can be bargained away for other benefits which a union happens to prefer—would be nullified. The argument that the public would suffer no detriment from such lack of uniformity is totally without merit. One purpose of such legislation and principles of admiralty and maritime law is to protect seamen and others against becoming public charges. Taking away this protection is certainly against the public interest.

Finally, without any authority to support the proposition appellants argue that ancient principles of maritime law should be modified by judicial action. Factually this argument disregards the reality that seamen and fishermen are still subjected to risks arising from "the peculiarity of their lives, liability to sudden sickness from change of climate, exposure to perils, and exhausting labor." *Harden v. Gordon,* Fed. Case No. 6047 (cited by appellants as setting forth a statement of conditions which have now changed). Fishermen are still tied to their vessels particularly when at sea. Fishing vessels still sink and this quite frequently. Fishermen are still subject to the absolute commands of their masters. In addition, they labor part of the time for nothing in the hope of obtaining earnings when they go fishing, a risk so far as compensation goes which is beyond that of the average seaman.

Finally, however, and most important on this point is the fact that appellants are asking this Court to overrule

the Supreme Court of the United States. In the present period with all of the conditions of seamen substantially the same as they are today, the Supreme Court held that seamen are wards of admiralty and are to be treated with respect to contracts like beneficiaries are with respect to fiduciaries requiring the latter to affirmatively show that no advantage had been taken over the former. Said the court, "The law (on maintenance and cure) is to be liberally construed to carry out its full purpose which is to enlarge admiralty protection to its wards." *Garrett v. Moore-McCormack, Co.,* 317 U. S. 239.

The appellants would have this Court diminish the admiralty protection extended to fishermen as seamen. The refusal of the court below to do this and its declaration that a contract clause purporting to deprive a seaman of his right to wages to the end of the period of employment is void is patently correct and should be affirmed.

II.

The Court Below Correctly Ruled That Petitioner Was Hired for the Entire Fishing Year of 1952 and Was Entitled to His Share of the Catch for That Entire Year.

As is noted in the Statement of the Case the complaint alleged that the agreement of hire was for the year. This was admitted in the answer and found to be true by the trial court. If it is possible at all for appellants to have a judgment based on such a record reversed is questionable. If it is possible the burden on the appellant is indeed a heavy one.

Appellants rely upon a clause in the collective bargaining agreement which provides that all year round tuna boats shall have two seasons, and that crew members are

hired for the season and may be discharged only for good cause shown. This clause of the collective bargaining agreement, however, must be construed together with another clause dealing with the same subject and providing that at the end of the season certain functions shall be performed by the crew. In this case admittedly those functions were not performed until the boat stopped fishing in September of 1952. By their own conduct appellants did not choose to treat the end of the six-month period as the end of the season and therefore they are hardly in a position to contend that the season ended at the end of the six months simply because appellants had a right to have it end at that time if they had chosen that course.

Much more important, however, is the fact that the collective bargaining agreement does not prohibit hiring for the entire year and such hiring is in no way a violation of the collective bargaining agreement. As a matter of fact, the record shows without contradiction and out of the mouths of respondents themselves that the uniform custom on year round tuna boats was to treat the entire year as the season and to hire fishermen for the entire year. That such a custom, when as here it is legal, becomes a part of the contract between the parties is established law. *Robinson v. United States,* 13 Wall. 363; *Shipman v. Straitsville etc.,* 158 U. S. 356. This principle has been applied to maritime contracts. *Hostetter v. Park,* 137 U. S. 30.

Moreover, the only period of time referred to in the conversation which led to the hiring of appellee by appellants was a year. There was no reference to a season. This uncontradicted evidence was ample to support a finding of an oral contract to employ appellee for a period

of one year. This contract in no way violated the collective bargaining agreement.

Appellants placed great stress upon the shipping articles as supporting their position that the contract was for a single voyage. Thus they place themselves in the position of arguing that the shipping articles control over the collective bargaining agreement while in other respects they themselves rely on the collective bargaining agreement as establishing the terms and conditions of employment between the parties. It is submitted that the correct principle to be applied here is that the shipping articles cannot deprive the fisherman of his right under that collective bargaining agreement to a minimum period of employment of six months or to the end of the season which in this case turned out to be the entire year. However, there is no reason why the shipping articles cannot apply for a longer period of time than the minimum period of employment guaranteed by the collective bargaining agreement because such longer periods of employment is not inconsistent with the minimum guarantee secured by collective bargaining. *Cf. Warren v. United States, supra,* 75 Fed. Supp. at 839.

In any event the shipping articles properly construed supports the position of appellee, not that of appellants. It is elementary that having been prepared by an agent of appellants they must be construed strictly against appellants. In addition, they should be liberally construed in order to accomplish the purpose the parties had in mind, *United States v. Westwood,* 266 Fed. 696, 697 (C. A. 4, 1920), particularly with respect to the maritime rights of seamen, *Garrett v. Moore-McCormack, supra,* 317 U. S. 239.

The fact that shipping articles are signed only once a year instead of each trip is a strong indication of the fact that the shipping articles are intended to cover the year and not the trip. There is no other explanation for this undenied practice. Looking at the shipping articles themselves it will be observed that in a section which on the face of the articles is designed to indicate the "probable length of the voyage," with the warning that the probable length of the voyage should not be indicated if the words are not necessary, the shipping articles specify "a term not exceeding twelve calendar months." The undisputed evidence is that the average trip to Mexico is 30 days, a very, very long trip is 70 days and it is inconceivable that a trip would take 12 calendar months. If the articles were truly intended to cover only one trip then the period set forth would not conceivably be 12 calendar months. However, that 12-months period is entirely consistent with the customary hiring of fishermen employed on all year round tuna boats for the entire fishing year.

Even if the articles in this case were construed as to apply to only a single trip that would have no effect on the period of employment under the facts and circumstances of this case. Shipping articles are not intended to forbid or prevent parties from establishing and maintaining a continuing relationship beyond the period prescribed in any particular set of such articles. Their purpose is to protect the seaman, not to limit his right to protect himself beyond the period of the articles; where by oral agreement or custom the term of employment extends beyond the period prescribed in the shipping articles, the oral agreement or custom will prevail, not the shipping articles. *N. L. R. B. v. Waterman S.S. Co.,*

309 U. S. 206, 218. See also *Southern S.S. Co. v. N. L. R. B.,* 316 U. S. 31, 37-8, where the court said: "The terms of employment must be determined in the light of all the evidence concerning petitioner's employment customs and practices." From early times it has been held that proof of an oral agreement binding on the parties and extending beyond the period of employment provided for in shipping articles is admissible and that the oral agreement is binding on the parties. *The Cypress,* Fed. Case 3530; *Page v. Sheffield,* Fed. Case 10,667.

In the case of *Farrell v. United States,* 336 U. S. 511, relied on by respondents it was held that *under the facts of that case* the shipping articles were intended to cover a single voyage and the time limitation set forth in the articles referred to the duration of that voyage rather than to a stated period of employment. However, the court pointed out: "It is not questioned that the general custom on ships, other than the coastwide trade, is to sign for a voyage rather than for a fixed period." It was in the light of this custom that the finding with respect to the meaning of the articles in that case was made. Here, however, the uncontradicted evidence is that there is a custom to employ for the year, thus under the cited case, requiring the construction given the articles by the trial court. Moreover, in the cited case there was no proof of an oral agreement or of a collective bargaining agreement providing for employment for a minimum period of six months, nor was there evidence of a practice to use a single set of articles to cover all of the voyages made during an entire year of operation. The decision in this case is entirely consistent with and is in fact supported by that in the *Farrell* case.

Finally, the appellants rely on the case of *Medina v. Erickson,* ..... F. 2d ..... (1955 A. M. C. 2211), decided by this Court on October 19, 1955. This case it is respectfully submitted is determinative of the issue here in favor of appellee. The *Medina* case cites and relies upon *Luksich v. Misetich,* 140 F. 2d 812 (C. A. 9, 1944), holding that oral arrangements between the parties were admissible to show a duration of employment not consistent with the specific terms of the shipping articles. Following that precedent the court looked beyond the specific terms of the shipping articles involved in the *Medina* case in order to determine the period of employment covered by them. In that case the evidence established that there was a custom in San Diego that seamen including chief engineers by signing articles of the kind involved there bound themselves for only one voyage and that on each separate voyage separate articles were always signed. Upon this basis it was held that the time period set forth in the articles was a limitation upon the duration of the voyage and not a stated period of employment.[3] Thus the *Medina* case is authority for the proposition that in construing the meaning of the articles, it is necessary to look to the oral agreements of the parties

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[3]In connection with the first point of this brief it is interesting to note that in the *Medina* case the court said: "We take note that the agreement between the owners and the union provided that if any member of a crew became ill at sea and returned home with the captain's approval, he would 'receive a full share for that particular trip only.'" To this paragrauh was appended a foot note reading as follows: "But we place no reliance on the provisions of the collective bargaining agreement in reaching our conclusion." This is of great importance because if the collective bargaining agreement were valid and binding on the parties, then the specific clause referred to would in a very simple and direct manner have disposed of the issue under consideration.

and to the prevailing custom. In this case all of the evidence on the point supports the court below and the position of the appellee.

The finding of the court below that appellee was entitled to wages to the end of the 1952 fishing year is clearly supported by the evidence and by the law and should be sustained.

III.

The Trial Court Correctly Awarded Appellee Maintenance Up to the Time That It Was Reasonably Determined That His Condition Had Become Permanent.

On this issue Judge Mathes in his opinion stated:

> "The shipowner's obligation to furnish maintenance is coextensive in time with his duty to furnish cure (*Skolar v. Lehigh Valley R. Co.,* 60 F. 2d 893, 895 (C. A. 2, 1932); *Cf. The J. F. Card,* 43 Fed. 92 (D. C., E. D. Mich., 1890)), and neither obligation is discharged until the earliest time when it is reasonably and in good faith determined by those charged with the seaman's care and treatment that the maximum cure reasonably possible has been effected. (*Farrell v. United States,* 336 U. S. 511, 517-519 (1949); *Cf. Calmar S.S. Corp. v. Taylor, supra,* 303 U. S. 523, at 528-530; *The Osceola, supra,* 189 U. S. 159 at 175; *Desmond v. United States,* 217 F. 2d 948 (C. A. 2, 1954), cert. denied, 348 U. S. ..... (4-18-55); *Reed v. Canfield, supra,* 20 Fed. Case (No. 11,641) at 429.)"

In *Lamon v. Standard Oil Co.,* 117 Fed. Supp. 831 (D. C., E. D. La., 1954), the court said:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or

> injured has been cured, or until the sickness or
> capacity has been declared of a permanent characte

The case of *Farrell v. United States, supra,* 336 U.
511, cited by appellants also supports appellee on t
point. In that case the Supreme Court pointed out t
the United States was a party to the 1936 Geneva C
ference of the International Labor Organization and t
the convention there adopted was proclaimed by the pre
dent as effective for the United States on October
1939 (54 Stat. 1693). Article IV, Section 1, of t
convention provides:

> "The shipowner shall be liable to defray the exper
> of medical care and maintenance until the sick
> injured person has been cured, or until the sickness
> incapacity has been declared of a permanent cha
> acter."

In the *Farrell* case, the Supreme Court pointed out t
the Department of Labor has issued a summary of t
convention to the same effect. 336 U. S. at 517-18.

The rule that maintenance and cure shall continue un
such time as the condition is declared permanent rath
than only until the time that it has become permanent
the only rule consistent with the purposes of maintenan
and cure. Maintenance is intended to continue as lo
as cure is necessary. Cure is necessary until it is d
covered that further medical treatment will be of no ava
The medical care necessary to discover that the conditi
has become permanent is itself an essential part of t
cure.

Maintenance is designed to provide for the support
the seaman during the period of his cure and the int
of the law is that it should be paid concurrently with t

cure. If the right to maintenance were cut off at the ime the condition became permanent rather than at the ime that that fact was reasonably ascertained, then there vould be every inducement on the part of the employer o stop payment of maintenance as soon as there was any ossibility at all that the condition had become perma- ient. This in itself would tend to defeat the principal urpose of maintenance.

On this point, too, the decision of the court below was consistent with a proper interpretation of the law and with authorities on the issue.

IV.
Conclusion.

The trial court wrote a carefully considered opinion covering each of the issues raised on this appeal and citing numerous authorities in support of the holdings of the court. Without attempting in any way to distinguish or deal with the opinion of the court below or with the authorities relied upon in that opinion, appellants ask for a reversal. They cite no authorities which when properly analyzed support any position that they take. All of the authority is to the contrary. The decision of the court below should be affirmed in its entirety.

Respectfully submitted,

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No. 14909

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO,

Appellee.

APPELLEE'S BRIEF.

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